Supreme Court, U.S.
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No. 88-1514.

In the

Supreme Court of the United States.

OCTOBER TERM, 1988.

NEWSPAPERS OF NEW ENGLAND, INC.,
PETITIONER,

v.

CLERK-MAGISTRATE OF THE WARE DIVISION
OF THE DISTRICT COURT DEPARTMENT,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Respondent's Brief in Opposition.

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25 pp

QUESTION PRESENTED

Does the constitutional right of the press and the public to attend criminal trials encompass a newspaper's request for pre-trial access to a search warrant affidavit in a highly publicized murder case, where the court otherwise had the discretionary authority to temporarily impound the affidavit in furtherance of the constitutional right of the accused to a fair trial?

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NEWSPAPERS OF NEW ENGLAND, INC.,

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v.

CLERK-MAGISTRATE OF THE WARE DIVISION
OF THE DISTRICT COURT DEPARTMENT,

Respondent

On Petition for a Writ
of Certiorari to the Supreme
Judicial Court of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. On August 4, 1986, Raymond Green, a supervisor at Belchertown State School, was murdered on the school campus. Kenneth Phoenix, an employee at Belchertown State School, was arrested on July 3, 1987 and was arraigned in the Ware

District Court on a charge of murder on July 6, 1987. Pet. 41a, 45a (¶¶ 1-2) (Findings of the District Court).

Belchertown is a rural community in western Massachusetts. The murder, and the arrest of the defendant Phoenix after almost a year of investigation, were the subject of numerous newspaper articles and newscasts. Interest in the events of the murder and in the subsequent charge against Phoenix was great in the community. Id. at 45a, ¶ 3.

On July 9, 1987, a search warrant, which had been issued by the Superior Court on July 3 for the search of Phoenix's home, was returned to the Ware District Court. Id. at 41a. On July 10, petitioner's newspaper was denied access to an affidavit which had been submitted in support of the application for the warrant. At petitioner's re-

quest, the District Court held an immediate hearing at which petitioner was represented by counsel. Id. at 41a-42a. The court ruled that the affidavit should be impounded to protect Phoenix's right to a fair trial. Id. at 42a.

2. Petitioner then commenced this action against the Clerk-Magistrate of the Ware District Court, the custodian of the impounded affidavit. An expedited hearing was held, at which Phoenix opposed the release of the affidavit. Id. On August 10, 1987, the court issued a Memorandum of Decision sustaining the order of impoundment. Pet. 41a-47a.

The court found the affidavit supporting the search warrant (which was impounded and was not part of the record on appeal) to be a sixteen-page document with statements, descriptions and allega-

tions gathered during the almost one-year investigation of the murder. The officer who presented the affidavit gathered the information therein from numerous and varied sources in the usual investigative course. The affidavit was support for a request for a search warrant, which requires a level of proof much less than that required of evidence presented in a criminal trial. The nature of investigatory information such as that contained in the affidavit was such that it might be suppressed or excluded as prejudicial. Pet. 45a, ¶¶ 4-7.

The court reasoned that the right to an open, public trial is not diminished by withholding, during the pendency of the criminal case, investigatory material which may or may not be admitted as evidence in the trial. If all of the information in the affidavit is admitted in

evidence during the trial, the public will have immediate access to it at that time. If less than all of the information in the affidavit is admitted in evidence, the public will have access to the remainder when the case is completed. Pet. 46a, ¶ 9.

This Court has recognized a constitutional right to attend criminal trials, see Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986), but the affidavit was "not part of a criminal trial. Rather, it is a pre-arrest document . . . containing descriptions, statements, and allegations compiled by law enforcement officials in the investigation of this murder." Pet. 44a. Moreover, the two-part test of history and function established by this Court as the basis for finding a constitutional right of access,

see 478 U.S. at 8 (quoted at p. 11, infra), was not satisfied:

> Historically, such investigatory materials are not disclosed to the public before the trial. Such disclosures have been deemed not to be in the public interest. Disclosure of such pre-arrest investigatory materials without the procedural protection present in a trial would undermine the integrity of the trial.

Pet. 44a. The court concluded that "[t]he public's right of access to a criminal trial does not include the right to discover pre-arrest investigatory materials presented to the court in an affidavit supporting a request for a search warrant." Id.

After considering the nature of the information in the affidavit and balancing the rights of the newspaper and the accused, and after considering corrective alternatives in securing a fair trial,

the court concluded as a matter of discretion that "justice requires impoundment of the affidavit during the pendency of this case." Id. at 46a-47a.

3. This order was upheld by an intermediate appellate court (Pet. 16a-40a) and thereafter by the Massachusetts Supreme Judicial Court (Pet. 1a-15a). The Supreme Judicial Court ruled that a search warrant affidavit on file with the court is generally a public document, but that courts have inherent discretionary authority to impound such documents in an appropriate case. Pet. 5a-6a. Here, there was good cause to impound the affidavit. Pet. 6a-8a. "Protecting a defendant's right to a fair trial is undeniably a substantial government interest." Pet. 6a, citing Press-Enter-

prise Co. v. Superior Court, 464 U.S. 501, 508 (1984).

The Supreme Judicial Court rejected the newspaper's claim to a First Amendment right of access. Pet. 8a-13a. Applying this Court's two-part test of history and function, see Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) (quoted at p. 11, infra), for determining whether such a right attaches to any particular judicial proceeding, the court agreed with the Washington Supreme Court in Seattle Times Co. v. Eberharter, 713 P.2d 710, 105 Wash.2d 144 (en banc 1986), that neither part of the test is satisfied in this context:

> (1) "Unlike trials, the historical record reveals no English or American tradition of public access to search warrants," and (2) "review will occur when the prosecution attempts to introduce, at trial, evidence ob-

> tained as a result of this probable cause determination . . . [and] immediate public access is not required for the effective functioning of the process itself."

Pet. 11a, quoting Seattle-Times, 713 P.2d at 714, 105 Wash.2d at 152-153.

The Supreme Judicial Court concluded that "no constitutionally guaranteed right of access to the affidavit existed at the time the plaintiff requested it." Pet. 12a-13a. The court also concluded that the district judge did not abuse her discretion in impounding the affidavit. The court dissolved the impoundment order, however, as Phoenix had been convicted (on June 3, 1988) of first degree murder, and accordingly "no basis [remained] for the continued impoundment of the affidavit." Id. Pet. 13a.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

Petitioner relies primarily upon a quartet of cases in which this Court recently has articulated a First Amendment right to attend criminal trials. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (right to attend criminal trial); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (same); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (Press-Enterprise I) (voir dire proceedings as part of criminal trial); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press-Enterprise II) (preliminary hearings in California -- "often the final and most important step in the criminal proceeding," 478 U.S. at 12).

In each of those cases, however, the First Amendment claim was a right to attend the judicial proceeding itself. Petitioner here expressly disclaims a right of access to the proceedings at which applications for the issuance of search warrants are considered by the courts. Pet. 7, at n. 4.

Moreover, those cases hold that the existence of a First Amendment right of access with respect to any particular type of proceeding depends upon a two-part inquiry: (1) "whether the place and process have historically been open to the press and general public;" and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." Press-Enterprise II, 478 U.S. at 8.

These tests are not satisfied when it comes to the issuance of search war-

rants. For obvious reasons, search warrants have never been issued in a public proceeding, and public access to such proceedings would not enhance but would destroy their effective functioning.

Since the First Amendment right to attend criminal trials does not extend to proceedings considering the issuance of search warrants, these cases do not support the newspaper's constitutional claim of access in this case. The rationale of these decisions, which are built upon the presence of both a historical tradition and a functional contribution of public attendance at particular types of criminal proceedings, simply is not fulfilled in this context.

The governing precedent of this Court with respect to judicial documents is, instead, Nixon v. Warner Communications,

Inc., 435 U.S. 589 (1978). Nixon recognized a generalized common-law right to inspect and copy judicial records. 435 U.S. at 597. But that right is not absolute, id. at 598, and "the decision as to access is one best left to the sound discretion of the trial court." Id. at 599. That is precisely what happened here.

Moreover, this Court has ruled that "[t]o safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979). The impoundment order here is consistent with that injunction and responsive to the underlying constitutional interest of the accused to a fair trial.

II. THE DECISION BELOW IS CONSISTENT WITH THE APPLICATION OF THIS COURT'S DECISIONS BY MOST OF THE COURTS OF APPEALS.

Petitioner asserts that federal courts of appeals have extended the analysis of this Court's quartet of First Amendment access cases (see p. 10, supra) to find a constitutional right of access to judicial records. Pet. 9-10 and n. 7. Generally, however, those courts recognizing a constitutional right of access to judicial documents have based their rulings on a right to attend the underlying criminal proceeding to which the documents relate. E.g., Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989) (records of acquittals); In re New York Times Co., 828 F.2d 110, 114 (2d Cir. 1987), cert. denied, ___ U.S. ___, 108 S. Ct. 1272 (1988) (pretrial suppres-

sion hearings); In re Washington Post Co., 807 F.2d 383, 389-90 (4th Cir. 1986) (plea and sentencing hearings); In re Globe Newspaper Co., 729 F.2d 47, 52 (1st Cir. 1984) (bail hearings); Associated Press v. United States District Court, 705 F.2d 1143, 1145 (9th Cir. 1983) (pre-trial proceedings).

Two of the decisions cited by petitioner do purport to analyze the application of a right of access to judicial documents independently of the judicial proceeding to which they relate, but in each case the documents did in fact relate to an open judicial proceeding. United States v. Smith, 776 F.2d 1104, 1111-12 (3rd Cir. 1985) (indictments returned in open court and supplementary bill of particulars); United States v. Peters, 754 F.2d 753, 763 (7th Cir. 1985)

(trial exhibits). Respondent submits that the analytical extension represented by these cases and proposed by petitioner would apply equally to a wide variety of public documents, far removed from the legitimate historical foundations which underlay this Court's finding of an implied constitutional right of access specifically for criminal trials. In any event, neither case involved disclosure of pre-arrest, investigatory documents.

In In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569 (8th Cir. 1988), as here, a newspaper appealed from the impoundment of affidavits filed with the court in support of the issuance of a search warrant. The court of appeals upheld the impoundment, a result consistent with the result in

this case. Two members of the panel, however, reasoned that the constitutional right to attend criminal trials extends to provide a right of access to search warrant affidavits. 855 F.2d at 573, 576. (The third member of the panel did not reach this question, id. at 575.) To the extent that this difference in reasoning but not in result presents a real conflict, respondent submits, for the reasons stated above, that it is the analysis in Gunn, and not the decision below, which is a departure from this Court's decisions.

III. THE DECISION BELOW DOES NOT CLOSE THE WARRANT PROCESS TO PUBLIC SCRUTINY.

Under the ruling below, search warrant affidavits are generally available to the press and the public. Although

occasions will continue to arise where particular affidavits are temporarily impounded in order to protect legitimate state interests, e.g., the integrity of an ongoing investigation (as in Gunn) or the accused's constitutional right to a fair trial (as here), the general principle is one of publicity, subject to traditional rules regarding the exercise of a trial court's reasonable discretion when faced with important countervailing interests.

A stricter First Amendment standard for public access to search warrant affidavits is not necessary to preserve the interests served by the Fourth Amendment. The extent to which the issuance of a warrant in a particular case does (or does not) conform to the requirements of the Fourth Amendment may, of course,

be fully explored through a motion to suppress in the criminal case itself. Moreover, the propriety of impoundment of a particular affidavit may, as was done here, be tested through appellate review.

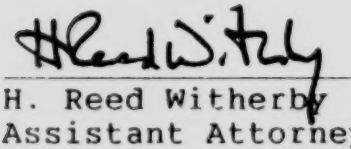
The common law standards for the sound exercise of judicial discretion give substantial weight to the legitimate interests of an open and democratic society in access to information about the operation of its courts. Petitioner has shown no need for imposing a stricter standard through the invocation of the First Amendment.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES M. SHANNON
ATTORNEY GENERAL



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